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No. 91-10

IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Spectrum Sports, Inc. and Kenneth B. Leighton file this Reply to Petitioners' Response to the Brief of the United States.

REPLY

Respondents ask the Court to disregard the United States' suggestion that the Court summarily reverse the decision of the Ninth Circuit Court of Appeals. Respondents object to the Solicitor General's suggestion for four reasons:

> 1. Respondents claim the United States raises issues that are not "case dispositive".
>
> 2. Respondents argue that *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.) *cert. denied*, 488 U.S. 87 (1988) limits the impact of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).
>
> 3. Respondents ask this Court to deny the Petition because this case has been pending for almost eight years.
>
> 4. Respondents' claim that even if this Court were to summarily reverse, the Ninth Circuit would probably reaffirm the trial court's judgment.

1. Summary reversal based either upon the Ninth Circuit's refusal to consider *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) or upon its continued allegiance to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) disposes completely of Respondents' case against Petitioners. The Ninth Circuit affirmed the trial court judgment based only upon its mistaken belief that the "attempt to monopolize" judgment was correct. It declined to review any other issue. Were this Court to reverse on the "attempt to monopolize" issue, no other basis to affirm the trial court's judgment remains. Further, contrary to their assertion, Respondents did not prevail on all other claims presented at trial. They failed

on their Section 1 claims and on the fraud count underlying their RICO claim. Therefore, a reversal based upon either the *Lessig* issue or the *Atlantic Richfield* issue disposes entirely of the Ninth Circuit decision.

2. Respondents argue the importance of *Lessig* is diminished by *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988). However, in this case, the trial court, upon Respondent's objection, overruled Petitioners' request for an *Oahu Gas* instruction. R.T. 3915. As a result, Petitioners never had the benefit of a proper instruction that might have cured the ills inherent in *Lessig*.

3. Respondents' frequent complaint that this case has been pending for almost eight years misses the mark. This Court should not affirm an unjust, multi-million dollar judgment simply because of the age of the case. Mere aging cannot cure an error-ridden decision.

4. Respondents' claim summary judgment would be a hollow act because they believe the Ninth Circuit will reaffirm. To the contrary, vacating and remanding the Ninth Circuit's decision, as the United States suggests, will result in a new trial in which Petitioners may have the jury consider whether or not Respondents have proved antitrust injury. *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987). Moreover, Respondents' position is belied by their opposition to the United States' suggestion. Were Respondents truly confident the Ninth Circuit would reaffirm, their quarrel with the United States would be unnecessary.

For these reasons, if the Court chooses not to grant plenary review of this petition, Petitioners request the Court to follow the suggestion of the United States and summarily reverse and remand this case to the Ninth Circuit.

Respectfully submitted,

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